National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 2, 1996

TO: Richard L. Ahearn, Regional Director, Region 9

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Millwright and Machinery Erectors Local 1241 (NKC of America), 9-CB-9207, -9208; South Central Ohio District Council, United Brotherhood of Carpenters (NKC of America) Case 9-CB-9225, of the United Brotherhood of Carpenters and Joiners, (NKC of America, Inc.), Cases 9-CB-9207, -9208; South Central Ohio District Council, United Brotherhood of Carpenters and Joiners, (NKC of America, Inc.), Case 9-CB-9225

536-2581-0140, 536-2581-0180, 536-2581-3314

These cases were submitted for advice as to whether a union violates Section 8(b)(1)(A) by failing to inform an employee of an employer's refusal, pursuant to an exclusive hiring hall agreement, to hire that employee.

FACTS

The applicable collective-bargaining agreement, which is negotiated and signed by the South Central Ohio District Council, is enforced by Local 1241 and several other locals under the District Council. The International Union and the relevant employer association are also parties to a National Maintenance Agreements Policy Committee Agreement which, in Article XIX, Item 2, gives employers the right to "determine the competency of all employees." The parties apparently have interpreted this provision to mean that employers may reject employees referred to them by the Union's hiring hall.

The charge in Case 9-CB-9208, which was filed by Lee Murray, alleges that Local 1241 has violated Section 8(b)(1)(A) by failing to follow hiring hall rules which require the Local to notify an individual when employers request that a given employee not be referred. Murray also filed a charge against NKC of America (the Employer), which alleges that the Employer has violated Section 8(a)(1) and (4) by refusing to hire Murray because he has filed charges with the Board. The Region has found this charge to be meritorious and is not submitting it for advice.

The charge in Case 9-CB-9207 was filed by Lee Murray's son, Robert Lee Murray (a/k/a Bobby Lee). This charge alleges that the Union has violated Section 8(b)(1)(A) by refusing to refer him to jobs with the Employer and by failing to follow the hiring hall rule described above.[(1)]

Lee Murray filed the charge in Case 9-CB-9225, which alleges that the District Council has unlawfully refused to refer him, his son, and "other similarly situated applicants for employment" for jobs with signatory employers for reasons other than the failure of the job applicants to tender periodic dues and initiation fees.[(2)]

Lee Murray has been involved in prior Board proceedings against employers and Local 1241.[(3)] He has also had a hostile relationship with a number of officers of Local 1241 and/or agents of the District Council. Robert Lee Murray has apparently had a similarly acrimonious relationship with Union officials.[(4)]

The charges in the instant cases are the result of letters that Fred Sheward, project manger for the Employer, sent to Local 1241, stating that the Employer did not want the Local to refer "Lee Murray" to it for work.[(5)] Lee Murray admits that he worked with Sheward in 1970, although for a different employer, and at that time he "got into a fist fight" in a bar with Sheward.

Sheward sent a letter rejecting Murray to the Union on June 22, 1993. The letter referred to the NMAPC Agreement provision

giving employers the right to determine the competency of employees and stated that the Employer was exercising that right and asking the Union not to refer Lee Murray or two other employees, Todd and Rodney Vulgamore.

In early December 1994, Lee Murray contacted Bud Lamb, a Union representative, and inquired about work for NKC, which was performing work at a Honda plant in Marysville, Ohio. Lamb replied that he could not send Murray to that job because of the letter that he had received from Sheward. Thereafter, Lee Murray telephoned Sheward, who admitted writing the letter. When Murray asked him why he had done so, Sheward allegedly replied, "I heard that he had filed charges with the National Labor Relations Board and I didn't want a troublemaker on my job." Murray asserts that Sheward also said that the letter had nothing to do with Murray's work abilities. However, Murray further asserts that Sheward stated he would send the Union another letter, rescinding the letter described above. However, Sheward allegedly also said that he could not employ Murray for the job because he already had his crew picked. Murray asserts that he believed that he and Sheward and settled their differences and that he would be called the next time that the Employer needed a referral.

Sheward never rescinded his 1993 letter. Instead, on December 9, 1994, Sheward send a second letter to the Local Union. That letter states, "As an employer we reserved the right listed above [referring to the NMAPC Agreement] and are asking you not to send Robert Lee Murray."

Murray subsequently told his son about the early December 1994 telephone conversation described above. At the next monthly meeting of the Local Union, on January 3, 1995, Robert Lee Murray brought up the subject of "secret letters."[(6)] Robert Lee Murray stated that he thought it inappropriate for contractors to send letters to the Union stating that specific employees are not to be referred and for the Local not to notify the individuals involved or to investigate in any way.

Bud Lamb then replied that he agreed that such letters were not appropriate and stated that, "from this time forward, anyone receiving secret letters would be notified."

However, the Local never referred Lee Murray to the Employer, although it referred him for work with another employer who was performing work at another Honda plant, in Sunbury, Ohio. On that job, Murray worked with Gary Harman, another member of the Union. Hartman called Murray around June 21, 1995, and stated that he had been working for the Employer at the Honda Marysville plant. Shortly thereafter, Lee Murray contacted Bud Lamb and asked why he had not been referred for work at the Employer, since he was ahead of Hartman on the Local Union's out-of-work list. Lamb replied that he still had a letter from Sheward denying Murray employment. Murray told Lamb that he had talked with Sheward and that they had resolved their differences. Lamb stated that the letter from Sheward had not been rescinded and therefore the Local Union could not refer Murray to the Employer. Lee Murray then asked why Bobby Lee Murray had not been referred to the Employer since he was ahead of both Lee Murray and Hartman on the out-of-work list. Lamb said that he also had a letter about Bobby Lee so he could not be referred to the Employer.

Apparently, after Lamb talked to Lee Murray around June 21, 1995, Lamb called Sheward and asked if the December 9, 1994, letter, which referred to "Robert Lee Murray," was for the father or son.[(7)]

Sheward allegedly replied that the letter referred to the father and that the December 9, 1994, letter was merely an update of his June 22, 1993, letter. Lamb did not ask why the Employer did not want Lee Murray.

The Local Union referred Robert Murray to work for the Employer at the Marysville Honda plant for four days, beginning on December 23, 1994. Murray worked directly for Sheward and states that Sheward never said anything to him about his work during that period. Murray was not referred to any jobs at the Marysville plant after that assignment, but he was referred to work for the Employer at the Honda plant in East Liberty, Ohio, during the week of January 1, 1995. The Union did not refer anyone to the Employer for work in the Marysville Honda plant until the week ending April 2, 1995. The Union specifically identifies David Bingham as a member who was referred to work for the Employer at the Marysville plant on June 24, 1995, even though Bingham was behind both Murrays on the out-of-work list.

On June 23, 1995, Robert Murray had telephone conversations with Ed Layton, of the District Council, and Bud Lamb. The subject of the conversations was Robert Murray's belief that he was being passed over on the out-of-work list. He asked the Union officials what they were going to do about these failures to refer. It does not appear that Murray specifically referred to

the NKC "do not refer" letters during these conversations.

However, Robert Murray subsequently brought before the Union the effect of "secret letters" on his referral opportunities. Before a Union meeting scheduled for July 11, 1995, he told Local Union President Warren Self that he intended to bring up at the meeting "my problems of being skipped over because of the secret letters." During that meeting, he complained that he had been passed over for job referrals and that the Union had not tried to determine whether the letter was about him or his father; Steve Lamb, the son of Bud Lamb, stood up and attempted to interrupt Murray. After Murray told Lamb to stop interrupting him, Lamb started to yell and poke his finger in Murray's face; a fight then erupted.(8)

Sheward admits that he sent letters to the Local Union requesting that Lee Murray not be referred to work. Sheward stated, in writing, that he wrote the letters because "Mr. Murray has a reputation for filing civil law suits(9) against companies that he works for....Mr. Murray also has a reputation for being quick to use his fists to settle disagreements. As Project Manager, I feel I have a responsibility to the Company not to put them in this type of situation." The Region has concluded that the Employer violated Section 8(1) and (4) by denying Murray employment because he had previously filed Board charges.(10)

The Region has also concluded that, although Murray first learned of Sheward's June 1993 letter in December 1994, the charges in Cases 9-CB-9207 and -9208, which were filed on August 16, 1995, are not barred by Section 10(b) because Murray believed that Sheward intended to rescind that letter and did not learn until June 1995 that, to the contrary, Sheward had actually updated the letter in December 1994.(11)

ACTION

We conclude that there is no merit to the charge allegations submitted for advice.

It is well established that a union has an obligation, imposed under its duty of fair representation, to avoid conduct that is arbitrary, discriminatory or taken in bad faith.(12)

More specifically, the duty of fair representation imposes upon a union the "establishment and nondiscriminatory use of objective standards in the operation of exclusive hiring halls."(13)

However, consistent with Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961), the Board cannot tell a union specifically how to operate its hiring hall in absence of evidence of a violation of the Act; the Board can merely articulate certain standards, such as the duty of fair representation, that the operations of the hiring hall must meet.

These cases raise various questions about how, consistent with its duty of fair representation, the Union is required to deal with employers and users of the hiring hall when employers have the right to reject employees referred through the hiring hall.

Initially, we note that there is neither an allegation nor evidence that the Unions' inactions -- the failure to ask the Employer why it rejected Murray and the failure to notify Murray of the "do not refer" letters -- were motivated by discrimination or bad faith towards Murray. Thus, the key question was whether the Unions' failures to take the actions listed above were arbitrary.

The Board's most recent commentary on arbitrariness in union representation can be found in NALC Branch 529, 319 NLRB No. 3 (1995). In that case, the charging party, who was a "transitional employee," had filed a grievance claiming that the employer had improperly failed to merge her score on the list of applicants for permanent career positions in accordance with an agreement between the employer and the union. The grievance was initially denied but was settled at step 2 of the parties' grievance procedure. At the same time, but for unrelated reasons, the employer notified the charging party that she would not be reappointed to a subsequent "transitional employee" assignment. Thereafter, the charging party called the union representative and asked for copies of her "grievance forms" so "she could try to get her job back." NALC Branch 529, slip op. at 1. The charging party did not explain why she felt she needed the grievance forms or then inform the union representative that she intended to file an unfair labor practice charge against the employer, alleging that she had not been reappointed

because she had filed the grievance. The union representative, and subsequently, the union president told the charging party that it was the union practice to give employees copies of their grievance settlements, but not the underlying forms. Even after the charging party explained why she wanted the grievance forms, the union refused to provide the forms, claiming they were acting on advice of the national business agent and because the forms were the union's property. The union stated that its refusal was based on its policy, not on a specific rule.

Based on these facts, the Board found that the union violated Section 8(b)(1)(A) by arbitrarily refusing to give the charging party copies of her grievance forms. The Board stated, "...a union's conduct is arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." Id., slip op. at 3 (citations omitted).

Arbitrary union inaction also has been found unlawful. In Teamsters Local 282 (Transit-Mix Concrete Corp.), 267 NLRB 1130 (1983), enfd. 740 F.2d 141 (2d Cir. 1984) the Board found that a union violated its duty of fair representation when it arbitrarily failed to inform laid-off employees of new steps that they had to take, pursuant to a modification of an arbitration award, to preserve their seniority for purposes of recall. The Board stated, at 1131, that it was not holding that a union had to publicize all arbitration awards; instead, the union was obligated to because the employees needed the information so they could take steps to protect their employment rights.[(14)]

Applying the standards of arbitrariness set forth in on NALC Branch 529 and Transit Mix, we conclude that the Unions did not act arbitrarily in these cases.

Initially, we conclude that the Local Union was not obligated, in the abstract, to ascertain the reasons underlying the Employer's rejection of Lee Murray because the contract provision that gave the Employer the right to determine employees' competency was lawful, did not give the Union the right to challenge the Employer's determination,[(15)]

and the parties interpreted the provision to mean that employers could reject employees for any reason.[(16)]

Moreover, the Board lacks authority to add to the collectively bargained clause in question a Board-imposed requirement that the Union determine the reasons for an employer's rejection of a referred employee.[(17)]

Next, we concluded that the Union was not obligated to tell Murray that the Employer had sent the Union a letter stating that it would not employ Murray.

It is also well established that a union must notify employees of changes in its hiring hall rules and procedures where employees need such new information to use the hall properly or to otherwise protect their interests as employees.[(18)]

Here, however, because the contractual referral provision gives the Employer the right to reject an employee, notice of such a rejection would not generally give the employee any right against the Union for honoring the rejection request. The employee's dispute would be primarily with the employer that sent the "do not refer" letter, and only secondarily with the Union for honoring the letter. Here, Murray's claims can be vindicated through his meritorious Section 8(a)(4) and (1) charge. Thus, even if the General Counsel were to decide to put before the Board the question of whether a union operating a hiring hall is obligated to inform an employee of a "do not refer" letter, the instant cases would not be good vehicles for litigating the question. Hence, Murray's rights can be protected more directly by requiring the Employer to cease and desist from its unlawful activity than by seeking to have the Unions inform Murray of the Employer's "do not refer" letters.

We also considered, but rejected, the argument that the Unions were nonetheless obligated to tell Murray about the rejection letters because the Unions knew that Murray was an activist who had previously won cases before the Board, and therefore the Unions should have realized that the Employer might have rejected Murray for reasons that violated Section 8(a)(3) or (4). Such an argument would require analogizing these cases to Section 8(b)(2) - 8(a)(3) cases involving a union's request that an employer discharge an employee for failure to comply with union-security clause. Where the employer has reason to believe that the discharge request may be unlawful, the employer is obligated to investigate before complying with the request.[(19)] However, an employer is not obligated to investigate the validity of the discharge demand where there are no circumstances

that would lead the employer to doubt the lawfulness of the discharge demand even though the union's discharge demand was unlawful.(20)

To find merit to the argument set forth above, the General Counsel would have to argue that any employer refusal to accept the referral of a known union activist imposes upon the union an obligation to investigate whether the rejection was for lawful or unlawful reasons, even where, as here, the employer's asserted reason is not facially unlawful. We do not believe that the duty of fair representation imposes such an obligation upon a union. Indeed, imposing such a requirement would have the consequence of requiring a union to engage in disparate treatment of employees rejected by an employer, depending upon whether the union knows if the employer is aware of an employee's Section 7 activities. Moreover, as noted above, these are not good vehicles for litigating the argument that the Local Union was obligated to inform Murray when it received the "do not refer" letters because after he became aware of the letters, Murray filed a meritorious Section 8(a)(4) charge that would better vindicate his rights than would Section 8(b)(1)(A) charges.

We also note that the Union was not aware of any specific dispute between Murray and the Employer at the time it received the "do not refer" letters. Hence, even if it were to be argued that knowledge of a dispute between an employer and an employee would obligate a union to investigate the merits of the "do not refer" letter and/or inform the employee that it had received such a letter, such an obligation did not exist when the Union received the letter.

Next, we concluded that the Local Union did not unlawfully violate its own hiring hall rules when it failed to tell Murray about the second "do not refer" letter. That letter was sent on December 9, 1994. At a Union meeting held on January 3, 1995, when Robert Lee Murray brought up the subject of "secret do not refer" letters, Lamb stated that henceforth the Local would notify employees about "secret letters." Thus, the rule was not in effect when the Union received the second letter. Therefore, the Union did not unlawfully break its own rule when it failed to notify Murray about the second letter.(21)

Further, the evidence shows that the Union did inform Murray of June 1993 letter. When the Union received the December 1994 letter, the Union had no reason to believe that this was other than a reaffirmation of the June 1993 letter which Murray knew about. There is no evidence that the Union was aware that Murray thought, based on his conversations with Sheward, that the June 1993 letter was going to be rescinded. Thus, the Union had no reason to bring the December letter to Murray's attention.

Finally, since the contractual provision giving the Employer the right to reject hiring hall referrals is lawful and we have concluded that the Union had no obligation to inform employees who are the subjects of such letters, absent Union knowledge, not present here, of an unlawful motive for the employer's rejection of the employees, we further conclude that the Union did not act unlawfully when it complied with the "do not refer" letters and failed to refer Murray to the Employer, even after the Union promulgated a rule that it would inform employees who were the subjects of such letters.(22) We note specifically that the Union agreed merely to inform the targets of such letters, not to refuse to honor such employer requests.

For all of the above reasons, we conclude that there is no merit to the charge allegations discussed above.

B.J.K.

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[1] The charge also alleges that the Local Union violated Section 8(b)(1)(A) on July 11, 1995, when the son of the business agent assaulted Robert Lee Murray during a monthly union meeting. The Region has found no merit to this allegation and is not submitting it to Advice.

[2] The Region has concluded that, although the Local Union keeps the out-of-work list in its office, the business representatives, who maintain the list, are employees of the District Council. Furthermore, actual authority is in the hands of the District Council, which negotiated the current collective-bargaining agreement and subsequently executed that agreement, although members of the Local Union had voted to reject the agreement.

[3] See Allied Riggers, 268 NLRB 1194 (1984), enfd. mem. (6th Cir. 1985); Ziniz, Inc. and Local 207, Successor to Local 1241, 290 NLRB 887 (1988). Locals 207 and 1241 have gone through a number of mergers and other structural changes during the past few years; hence, Local 207 is listed as a successor to Local 1241 in Ziniz but the charges in these classes involve Local 1241. Murray also filed other meritorious charges against the District Council and Local 207; these cases were informally settled shortly before the trial was supposed to begin.

[4] See fn. 1, above.

[5] The Region notes that it is not always clear whether the "Lee Murray" referred to in various letters is Lee Murray,

the father, or Robert Lee Murray, the son. The Region notes that both men have used a variety of similar names.

[6] Lee Murray asserts that he has not attended any meetings of the Local Union since 1991, pursuant to the request of the chief business agent of the Local, because he had gotten into a fight with another business agent several years earlier.

[7] See fn. 4, above.

[8] As noted in fn. 1, above, the Region has concluded that there is no merit to the charge that the Union was in any way responsible for this altercation.

[9] See fn. 2, above.

[10] See Ziniz, supra, and fn. 5, above.

[11] The charge in Case 9-CB-9225 was filed on September 18, 1995.

[12] Airline Pilots Assn. v. O'Neill, 499 U.S. 65 (1991); Vaca v. Sipes, 386 U.S. 171 (1967); Miranda Fuel Co., 140 NLRB 181 (1962).

[13] Plumbers Local 32 (Alaska Pipeline), 312 NLRB 1137, 1138 (1993), enfd. (?) 50 F.3d 29 (D.C. Cir. 1995).

[14] See also Plumbers Local 519 (Sam Bloom Plumbing), 306 NLRB 810 fn. 1 (1992).

[15] Compare P & L Cedar Products (Washington-Oregon Shingle Weavers District Council), 224 NLRB 244, 260 (1976) and cases cited therein (Union violates its duty of fair representation if, after receiving employee's grievance, it merely accepts employer's explanation but does no additional investigation).

[16] Compare NALC Branch 529, supra, where unjustified union "policies" were deemed an arbitrary basis for the union's refusal of the charging party's request for copies of her grievance forms.

[17] See H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1970).

[18] See Plumbers Local 230, 293 NLRB 315 (1989); Transit-Mix, supra. Compare IBEW Local 6 (San Francisco Electrical Contractors), 318 NLRB No.7, slip op. at 2 (1995), where the Board agreed with an ALJ's conclusion that a union had violated Section 8(b)(1)(A) by failing to provide information requested by hiring hall users about the hall's practices, standards, and procedures. However, the Board found it unnecessary to reach the ALJ's second conclusion that a union was obligated to inform employees of hiring hall rules even where the employees had not asked questions. The Board stated that the finding of such an additional violation would not add to broad remedies already found warranted.

[19] See Western Publishing Co., 263 NLRB 1110, 1113 (1982).

[20] See R.H. Macy & Co., 266 NLRB 858, 859 (1983).

[21] Compare Painters Local 1140 (Harmon Contract), 292 NLRB 723, 724 (1989); Operating Engineers Local 406 (Ford, Davis & Bacon Construction), 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983).

[22] Therefore, there is no merit to the allegation in Case 9-CB-9207 that the Union unlawfully refused to refer Robert Lee Murray because it mistakenly thought that he was the subject of the Employer's "do not refer" letter. We also note that after Lee Murray asked why Robert Lee Murray also had not been referred, the Union contacted the Employer to ascertain which Murray -- father or son -- was referred to in the Employer's "do not refer" letter.